Supreme Court, U.S.
FILED
MAY 8 2002
CLERK

(8)

No. 01-270

In the Supreme Court of the United States

October Term, 2001

YELLOW TRANSPORTATION, INC.,

Petitioner,

v

STATE OF MICHIGAN, *ET AL*,

Respondents.

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Michigan Supreme Court erred in holding that, under 49 USC 11506(c)(2)(B)(iv)(III) (1994) and 49 USC 14504(c)(2)(B)(iv)(III) (Supp V 1999), only a State's "generic" fee is relevant to determining the fee that was "collected or charged as of November 15, 1991."

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STATEMENT OF THE CASE

1. Congress enacted the Motor Carrier Act of 1935, as amended, 49 USC 301 *et seq*, to provide for limited state regulation of interstate commercial transportation. Through subsequent amendments, States were authorized to register interstate motor carriers, subject to supervision of the Interstate Commerce Commission ("ICC"). Under a registration program that began in 1965, States choosing to participate were allowed to charge up to $10 for each vehicle registered. As proof of registration each State issued each vehicle a stamp for each vehicle that was placed in the appropriate spot on "bingo cards" carried in the cab of each vehicle.

2. The Michigan Public Service Commission ("MPSC") began issuing bingo card stamps to interstate, foreign and exempt interstate motor carriers in 1989 pursuant to 1988 PA 347 ("Act 347"). Act 347 authorized the MPSC to begin charging fees for each vehicle of interstate motor carriers. See, Michigan Compiled Law ("MCL") 478.7(4). Additionally, Act 347 permitted the MPSC to enter into reciprocity agreements with other states that did not charge vehicles licensed in Michigan.

3. The interstate fees collected by Michigan pursuant to MCL 478.7(4), and authorized under 49 USC 14504(c)(2)(B)(iv)(III), are earmarked to fund extensive motor carrier safety activities in Michigan. In MCL 478.7(4), the Michigan Legislature provided that:

> Of the fees collected pursuant to this section, not less than 90% of those fees in excess of $1,400,000.00 annually shall be deposited in the truck safety fund established in Section 25 of Act No. 51 of the Public Acts of 1951, being section 247.675 of the Michigan Compiled Laws.

MCL 247.675 funds the creation of the Michigan truck highway safety commission which has as it purposes, *inter alia*

establishment of truck driver safety education programs, MCL 247.675(4)(b)(i); coordinating and administering grants for research and demonstration projects to develop the application of new ideas and concepts in truck driver safety education, MCL 247.675(4)(d)(i); and, investigating and making recommendations on the truck safety enforcement procedures of local law enforcement agencies, MCL 247.675(4)(d)(ii). In 2001, the MPSC collected approximately $2.7 million in fees pursuant to MCL 478.7(4) which resulted in approximately $1.2 million in funding for the Michigan Truck Safety Commission.

4. As of 1991, 38 States, including Michigan, participated in this registration system. Some States entered into reciprocal arrangements under which they would discount or waive the fee for carriers based in each other's State. Most States used the motor carrier's principal place of business as the basis for determining reciprocity. The MPSC, however, used the State in which the vehicle was base-plated, i.e., where it was registered or license-plated, as the basis for determining reciprocity. Under this approach, for registration years 1990 and 1991, the MPSC did not charge a fee for vehicles base-plated in a State that did not charge a fee for vehicles that were base-plated in Michigan.

5. Early in 1991 the MPSC determined that granting reciprocity using base-plating, rather than place of business, was unduly complex, inefficient to administer, and inconsistent with the registration system used by virtually all other states. See Affidavit of Thomas R. Lonergan, JA 6-7. For example, vehicles operated by a single motor carrier but base-plated in several different States required several different calculations. *Id.* This significantly increased the possibility of error in reciprocity waivers. *Id.*

6. Contemporaneously, in 1991 Congress was considering legislation to streamline the state registration system. Recognizing that such legislation could include a mandatory uniform approach by participating States and to be consistent with other States, the MPSC decided to terminate its

use of base-plating as the method of determining reciprocity in favor of the "principal place of business" method of determining reciprocity. JA 7.

7. Rather than immediately implementing this change in early 1991, the MPSC decided, for the convenience of the motor carrier companies, to implement the change in the fall of 1991 when the annual renewals occurred. JA 7.

8. On December 18, 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), PL 102-240, 105 Stat 1914-2207, that included Section 4005, "Single State Registration System" (SSRS). 105 Stat 2146-2148. 49 USC 14504(c).[1] The SSRS created a streamlined system for the registration of a motor carrier's vehicles engaged in interstate commerce. Previously, motor carriers were required to separately register their vehicles in each State within which those vehicles operated. The SSRS replaced this process with a single state filing system in which a motor carrier would only file in and submit a single payment to the state in which it had its principal place of business. Basically, the carrier would submit a single application that would indicate the states and number of interstate vehicles to be operated in such states.[2] That single filing and payment would then cover vehicle registrations and fees for all states where the motor carrier operated vehicles. The state in which the motor carrier has its principal place of business would then forward the registrations and fees to all other states where such vehicles are operated.

9. Although enacted in 1991, the SSRS was not implemented until January 1, 1994. 105 Stat 2148. The SSRS provided that the ICC was to prescribe standards for the SSRS.

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[1] Section 4005 of ISTEA was originally codified as 49 USC 11506 and subsequently recodified in 1995 as 49 USC 14504. As to the subsection of the SSRS that is at issue in this case the Respondents use the current U.S. Code cite of 49 USC 14504(c)(2)(B)(iv)(III) throughout the brief.

[2] An example of such a form is contained in the appendix to the Respondents' Brief in Opposition at pages 25b-31b. (Res. App., pp 26b-31b).

With respect to the fee system under the SSRS, Congress provided:

> (B) Receipts; fee system. Such amended standards—
>
> > (iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) *will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.* (49 USC 14504(c)(2)(B)(iv)(III)); (emphasis added.)

10. In September 1991, two months prior to the November 15, 1991 date specified in 49 USC 14504(c)(2)(B)(iv)(III), Michigan mailed renewal interstate application forms to motor carriers for the 1992 registration year. Res. App., p 25b. On the back of the application form were instructions which stated that "[t]he cab card stamp fees are based on the state or province shown on the ICC certificate or permit as the carrier's base of operations." Res. App., p 28b. The amount of fees appropriate to a motor carrier's fleet was determined by reference to an accompanying chart identifying cab card stamp fees. Res. App., p 30b.

11. No change was made to Michigan's registration fee of $10.00 per vehicle, as authorized by MCL 478.7(4). Nor was there any change to Michigan's long-standing practice of collecting renewal fees in the fall for registration in the upcoming year, as is the practice with most, if not all, other

States.[3] Moreover, there was no change in the States with which Michigan had reciprocity. The only change was the basis for determining reciprocity, i.e. the fee would be determined on the motor carrier's principal place of business rather than on the license plating of a particular vehicle. The result was that some carriers that previously had the fee waived under the base-plating methodology paid the $10 fee, while others that had not had the fee waived under base-plating would have the fee waived under the principal place of business methodology.

12. One carrier affected by this change was the Petitioner. In the calendar years 1990 and 1991, Petitioner had 3,730 vehicles base-plated in Illinois and Indiana. Under the base-plating method of determining reciprocity that the MPSC had followed at that time, Petitioner was not charged for those bingo card stamps as those States did not charge fees for vehicles base-plated in Michigan. See Affidavit of Thomas R. Lonergan, JA 7-8. After the MPSC changed its method for determining reciprocity based on a company's principal place of business, Petitioner paid a $10.00 per vehicle registration fee for all its vehicles, as its principal place of business was in Kansas, and Michigan had no reciprocity with the State of Kansas. Res. App., p 26b. The application form for the 1992 registration year was mailed to Petitioner in September 1991. The application form was returned on October 3, 1991 with payment in full. Res. App., p 25b.

13. On March 24, 1995, the Petitioner filed its complaint in the Michigan Court of Claims against the Respondents State of Michigan, the Michigan Department of Treasury and its State Treasurer, Michigan Department of Commerce and its Director, the Michigan Public Service

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[3] In fact, the SSRS procedures manual states that registrants must file an application for registration and pay fees no earlier than August 1 and no later than November 30 of each year for the upcoming year. Copies of the SSRS Procedures Manual have been lodged with the Clerk.

Commission and its Commissioners.[4] The Petitioner's complaint claimed that the Respondents had unlawfully collected registration fees on its trucks that traveled in interstate commerce, in violation of the federal Single State Registration System. 49 USC 14504(c)(2)(B)(iv)(III). Motions for summary disposition were filed by the Petitioner and Respondents. The Court of Claims denied Respondents' Motion but granted Petitioner's Motion. Appendix JA 19-22. The Court of Claims found that an ICC decision in *American Trucking Ass'ns – Petition for Declaratory Order – Single State Ins Registration,* 9 ICC2d 1184 (1993) was to be accorded deference and, based on a finding in that case, the Court ordered that the registration fees for the years 1994 through 1996 be refunded to Petitioner. JA 22. The Court of Claims then entered a judgment that ordered the payment of $99,580.00, plus interest, for fees paid for 1994, 1995 and 1996.

14. The Respondents appealed the Court of Claims' decision to the Michigan Court of Appeals. On August 14, 1998, in a split decision, the Court of Appeals affirmed the Court of Claims. *Yellow Freight Systems, Inc v Michigan,* 231 Mich App 194; 585 NW2d 762 (1998). JA 23-38. The majority opinion found that because 49 USC 14504(c)(2)(B)(iv)(III) did not reveal congressional intent, the

[4] It should also be noted that the Petitioner is not the only motor carrier to contest the Respondents' collection of registration fees under the SSRS. Schneider National Carriers, Inc. ("Schneider") sought recovery of the payment of registration fees in *Schneider National Carriers, Inc, et al v State of Michigan,* Court of Claims No. 96-16473-CM. Schneider's challenge mirrored the one advanced by Petitioner in this action. On November 24, 1997, the Court of Claims issued an Opinion and Order dismissing the complaint, holding that the fees collected by the State Defendants did not violate 49 USC 14504(c)(2)(B)(iv)(III). Schneider appealed the decision to the Michigan Court of Appeals which initially reversed the Court of Claims in an unpublished opinion due to the Michigan Court of Appeals holding in *Yellow Freight,* 231 Mich App 194. Following the Michigan Supreme Court's decision in *Yellow Freight,* the Court of Appeals affirmed the Court of Claims. Schneider has since filed an application for leave which is currently pending before the Michigan Supreme Court.

Court should defer to an interpretation given by the ICC in *American Trucking Ass'ns supra* and affirmed the Court of Claims. The dissent found no ambiguity in 49 USC 14504(c)(2)(B)(iv)(III), instead finding that the statutory language should be applied "according to its plain meaning and not according to the ICC's strained construction." 231 Mich App at 209. JA 35. The dissent stated that the ambiguity that the majority found was the result of the majority's failure to accept the statutory wording at face value. 231 Mich App at 210. JA 36. The dissent then stated, "[w]hen a statute is clear on its face, judicial construction is unnecessary and inappropriate." *Id.* JA 36.

15. The Michigan Supreme Court in a split decision reversed the Michigan Court of Appeals. *Yellow Freight System, Inc v Michigan,* 464 Mich 21; 627 NW2d 236 (2001). JA 39-59. Five Michigan Supreme Court justices examined 49 USC 14504(c)(2)(B)(iv)(III) and, based on its plain language, held that reciprocity agreements were not relevant to determining what fee was collected or charged by Michigan on November 15, 1991. JA 39-49. It found that the focus of 49 USC 14504 was not on what any particular carrier was charged but rather on the states' generic fee as of November 15, 1991. JA 48.

16. The Petitioner then filed a Petition for Certiorari that was granted by this Court on January 22, 2002.

SUMMARY OF ARGUMENT

The Michigan Supreme Court correctly decided that the plain and unambiguous language of 49 USC 14504(c)(2)(B)(iv)(III) authorizes the Respondents to continue to charge a $10 per vehicle fee under the SSRS program because that fee was collected or charged by Respondents as of November 15, 1991. The argument of Petitioner and its *amici* that reciprocity agreements must be considered when determining the maximum fee that may be charged to a particular carrier under the SSRS program has no foundation in the plain language of 49 USC 14504(c)(2)(B)(iv)(III), which makes no mention of reciprocity agreements. As the Michigan Supreme Court properly noted, the focus of the statute is the per vehicle fee under state law as of November 15, 1991 and not on whether that fee was charged to or collected from a particular carrier. The Michigan Supreme Court's reading finds support in both the text of 49 USC 14504(c)(2)(B)(iv)(III) when read as a whole and its legislative history. Moreover, the Michigan Supreme Court's decision results in a statutory scheme that is coherent and consistent in that it properly reflect Congress' intent in balancing the interests of States and motor carriers while facilitating a State's continued participation in the SSRS program.

Because the Michigan Supreme Court found the language in 49 USC 14504(c)(2)(B)(iv)(III) to be plain and unambiguous, it did not reach the second step in the analysis under *Chevron USA, Inc v Natural Defense Council, Inc*, 467 US 837 (1984), which is to determine whether the agency's interpretation of the statute is permissible. Here, the ICC's construction is not an interpretation, it is a rewrite. The ICC's interpretation is not permissible because it results in multiple fees per state, imposes a cap less than the $10 cap imposed by Congress, and prevents Michigan from charging the $10 per vehicle fee, even though Michigan actually collected and charged a $10 per vehicle fee as of November 15, 1991.

ARGUMENT

In *Chevron USA, Inc v Natural Resources Defense Council, Inc*, *supra*, this Court established that when interpreting a statute, the Court must first determine "whether Congress has directly spoken to the precise question at issue." 467 US at 842. If so, and "the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 US at 842. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute." 467 US 843.

The Michigan Supreme Court found that 49 USC 14504(c)(2)(B)(iv)(III) was clear and unambiguous and applied the statute as written. An analysis of the Michigan Supreme Court's decision and findings establishes that the Michigan high court correctly decided the matter. Although the Michigan Supreme Court did not reach the second step of the *Chevron* analysis, it is nonetheless clear that the ICC's interpretation is not based on a permissible construction of 49 USC 14504(c)(2)(B)(iv)(III).

A. THE MICHIGAN SUPREME COURT CORRECTLY RULED THAT THE REGISTRATION FEES CHARGED TO AND COLLECTED FROM CARRIERS, AS OF NOVEMBER 15, 1991, PURSUANT TO MCL 478.7(4) ARE AUTHORIZED BY THE PLAIN AND UNAMBIGUOUS LANGUAGE OF 49 USC 14504(c)(2)(B)(iv)(III).

The precise issue in this case is the meaning of 49 USC 14504(c)(2)(B)(iv)(III). Under that statutory provision the ICC was to prescribe standards for a fee system that:

> . . .will result in a fee for each participating state that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991.

In determining whether the MPSC lawfully collected a $10 per vehicle fee from the Petitioner under the SSRS, the Michigan Supreme Court made a number of key determinations. First, it held that the SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements. JA 47. Second, it held that because 49 USC 14504(c)(2)(B)(iv)(III) directs the ICC to "establish a fee system", the statute's focus is not on the fees collected from one individual company, but rather on the fee system that the State had in place on November 15, 1991:

> The new "fee system" is based not on the fees collected from one individual company, but on the fee system that the State had in place on November 15, 1991. (JA 47.)

Thus, the Michigan Supreme Court concluded:

> We must look not at the fees paid by Plaintiff in any given year, but at the generic fee Michigan charged or collected from carriers as of November 15, 1991. (JA 47.)

The Michigan Supreme Court then determined what was the registration fee that Michigan charged pursuant to Michigan law on November 15, 1991 by analyzing MCL 478.7(4), the applicable state law, as follows:

> To determine what registration fee Michigan charged on November 15, 1991, we examine M.C.L. § 478.7(4); MSA 22.565(1)(4) in the Motor Carrier Act. Since 1989 that statute has provided for a fee of $10 to be charged for those motor carrier vehicles operating in Michigan and licensed in another state or province of Canada:
>
> > The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00.

> The same statute, M.C.L. § 478.7(4); MSA 22.565(1)(4), also gives the commission the ability to waive the $10 fee under certain circumstances:
>
> > The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection. (JA 47-48.)

Based on its reading of MCL 478.7(4), the Michigan Supreme Court determined that the fee charged by Michigan as of November 15, 1991 was $10.00. The Michigan Supreme Court explained its decision, saying:

> Thus, under M.C.L. § 478.7(4); MSA 22.565(1)(4), the fee charged as of November 15, 1991, was $10. While that fee may be waived, and thus not "charged or collected," *for a particular carrier* under a reciprocity agreement, such voluntary agreements to waive the fee that happen to benefit a particular carrier do not affect the *generic* per vehicle fee in place on November 15, 1991. As stated, the clear focus of 49 U.S.C. 11506(c)(2)(B)(iv)(III) is on the generic "fee" that Michigan charged or collected as of November 15, 1991, and not on whether that fee was charged to or collected from a particular carrier.
>
> The ICC's position that "participating States must consider fees charged or collected under reciprocity agreements when determining the fees charged or collected as of Nov. 15, 1991, as required by § 11506(c)(2)(B)(iv)," added a concept not within the express language of the statute. It added consideration of voluntary agreements between the states to

> waive or reduce the fees imposed. It is not for the ICC, or this Court, to insert words into the statute. (JA 48-49; footnote omitted.)

When the Michigan Supreme Court's decision and findings are analyzed, it is clear that they are correct.

1. The focus of 49 USC 14504(c)(2)(B)(iv)(III) is not on what a particular carrier paid but on whether a per vehicle fee was charged or collected by the State on November 15, 1991.

The Petitioner claims that the fee that Congress permits the States to continue to collect or charge under 49 USC 14504(c)(2)(B)(iv)(III) is the fee that was "actually collected" by the State on November 15, 1991. The Petitioner further argues that the "actually collected" fee is carrier specific. That is, a state may not henceforth collect or charge a $10 fee from a carrier unless it collected or charged that $10 fee from that particular carrier as of November 15, 1991. The problem with this argument, as the Michigan Supreme Court recognized (JA 48-49), is that it adds a concept not contained in the express language of the statute.

The plain and unambiguous language of 49 USC 14504(c)(2)(B)(iv)(III) is that if a State collected or charged the $10 fee as of November 15, 1991, it may continue to do so. The statute does not require that the $10 fee was collected from or charged to all carriers. Nor does 49 USC 14504(c)(2)(B)(iv)(III) provide that the $10 fee had to be collected from a particular carrier as of November 15, 1991 for the State to be able to charge a particular carrier the $10 fee under the SSRS. The focus of the statute is on the actions of the State, not on the actions of any particular carrier. It is undisputed that Michigan collected and charged a $10 fee from motor carriers at all relevant times. Accordingly, Respondents may continue to charge up to $10 per vehicle under 49 USC 14504(c)(2)(B)(iv)(III).

The Petitioner, however, seeks to rewrite 49 USC 14504(c)(2)(B)(iv)(III) to add the following emphasized words:

> (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected *from* or charged *to each carrier* as of November 15, 1991.

The focus of the actual text, however, is upon the State, not the carrier. A review of the entire text of 49 USC 14504 also supports the Respondents' reading of the statute.

In a subsection preceding the subsection at issue, Congress specifically states that the fee system is to be:

> based on the number of commercial motor vehicles the *carrier* operates in a State and on the number of States in which the *carrier* operates. (49 USC 14504(c)(2)(B)(iv)(I); emphasis added).

As this Court recently noted in *Barnhart v Sigmon Coal Co*, 534 US 438; 122 S Ct 941 (2002):

> [I]t is a general principle of statutory construction that when "Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v United States*, 464 US 16, 23 (1983) (quoting *United States v Wong Kim Bo*, 472 F2d 720, 722 (CA 5, 1972). (534 US 438; 122 S Ct at 951).

If Congress intended that the State's authorized fee be whatever was collected from or charged to a particular carrier, the word "carrier" would have appeared in the subsection at issue, 49 USC 14504(c)(2)(B)(iv)(III). The fact that it does not, creates the presumption that Congress purposely excluded the word "carrier," since the focus was on whether a per-vehicle fee was collected or charged by the State.

The Respondents' reading of 49 USC 14504 is also in line with the legislative history of the SSRS. In an earlier

version of the SSRS, the method chosen to offset the loss of revenues to the States due to the implementation of the SSRS was through federal grants. This was noted in H R Rep No. 102-171(I), p 115, as follows:

> Section 406. State Registration
>
> Section 406 amends section 11506 of title 49 U.S.C.
>
> Subsection 406(a) provides that effective January 1, 1994 states are prohibited from requiring motor carriers regulated by the Interstate Commerce Commission to file certificates or permits with the states in which they operate. It further eliminates the requirements for displaying a decal to indicate the possession of such a permit or certificate or the collection of a fee for such registration or decals.
>
> States may continue the practice of requiring motor carriers to file and maintain proof of insurance.
>
> Subsection 406(b) authorizes the Secretary to make grants to states to offset revenues lost as a result of subsection (a). *A state is eligible if it had imposed and collected fees in 1991.* The funding is established at $50 million for fiscal year 1994. Reimbursement is for one year only. (reprinted in 1991 USCCAN at 1641; emphasis added.)

The method chosen to reimburse the States was later changed to its present wording by the Conference substitute. This was noted in H R Conf Rep No. 102-404, p 438, as follows:

> The new fee system is to be based upon the number of vehicles which a carrier operates in a state and the number of states in which that carrier operates. States will not be allowed to charge a greater fee under Section 405 than the fee they charged under the former program as of November 15, 1991. The fee cannot exceed $10 per vehicle under any circumstances.
>
> The Conference version of Section 405 does not authorize any funds to be distributed to the states from the Highway Trust Fund. (reprinted in 1991 USCCAN at 1818.)

As reflected above, the clear and consistent focus of Congress, both in the earlier bill and after the House Conference Report, when it was devising a method to reimburse the States for lost revenues was whether the State was collecting or charging a fee in 1991. Whether a State would be permitted to charge a vehicle fee under the SSRS was not determined on whether a particular carrier paid a fee in 1991 or what that fee may have been.

The flaw in Petitioner's interpretation of 49 USC 14504 which would render the State's fee to be carrier specific was succinctly described by the Michigan Court of Claims in a companion case,[5] as follows:

> The fact that an individual carrier was not assessed fees one year and was assessed fees the next year is irrelevant. The determining factor is location and is not focused on the individual carrier's mere existence. This narcissistic argument produces absurd results. It is a basic rule of statutory construction carried over from common law that absurd results should be avoided. *Fortunate v. Dept. of Transp.*, 449 Mich 991; 538 N.W.2d 669 (1995). If, for example, a carrier expands operations into the State of Michigan after November 15, 1991,

[5] As noted in the Statement of the Case, the Respondents' collection of registration fees under the SSRS was also challenged in *Schneider Motor Carriers, Inc, et al v State of Michigan.* The Michigan Court of Claims in that case, however, rejected the claim that the Respondents' collection of SSRS fees violated federal law.

then the State will be forever precluded from assessing a fee because the State did not previously assess a fee against that carrier's vehicles. Even more absurd is the situation where a carrier was not yet in existence as of November 15, 1991. In that case, all participating states would be precluded from assessing fees against that carrier because it never paid fees to any state prior to November 15, 1991. These possible results are contrary to the legislative intent of creating a fee system for the filing of proof of insurance. (*Schneider Motor Carriers, et al v State of Michigan,* November 24, 1997 Opinion. Michigan Court of Claims Docket No. 96-16473-CM. Res. App., pp 12b-13b.)

The Petitioner's interpretation of 49 USC 14504(c)(2)(B)(iv)(III) also creates practical problems. For example, what occurs if a carrier subsequently changes its principal place of business from a State that enjoys reciprocity to one that does not. Under the arguments of the Petitioner and its *amici,* a carrier changing its principal place of business from one state enjoying reciprocity to another State not having reciprocity would presumably result in an increase in the fees that were charged to that particular carrier as of November 15, 1991 and therefore in violation of 49 USC 145404(c)(2)(B)(iv)(III). Additionally, as noted *infra,* Congress directed the ICC to establish a single fee for each participating state. If that fee was based on what a particular carrier paid, the result would be the establishment of multiple fees, which is not what Congress mandated. Thus, the text of 49 USC 14504, when read as a whole, does not support the interpretation that Petitioner and its *amici* ascribe to it.

The plain and unambiguous language of 49 USC 14504(c)(2)(B)(iv)(III) is that if a State collected or charged a $10 fee as of November 15, 1991, it could collect a $10 fee per vehicle under the SSRS. The requirement is a general one and is not specific to a particular carrier. Inasmuch as Respondents

had a registration fee system that collected and charged $10 per vehicle in place at all relevant times (including the 1991 calendar year) the Michigan Supreme Court correctly found that Respondents' actions fully comply with 49 USC 14504(c)(2)(B)(iv)(III).

2. The SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements.

The Michigan Supreme Court's finding that the SSRS refers only to the fee charged or collected and contains no reference to reciprocity agreements is undeniably true. If Congress believed that reciprocity agreements were to be taken into account when determining what the state fee was as of November 15, 1991, it would have so provided. The Petitioner dismisses this finding of the Michigan Supreme Court saying it adds nothing useful to the analysis. Petitioner's brief, p 18. The Petitioner instead attempts to divert attention away from this point by arguing that the "critical inquiry is the fee collected or charged for operations as of November 15, 1991" and not "any of the myriad details that might affect the amount actually collected or charged." Petitioner's brief, p 19.

However, the Petitioner's and its *amici's* arguments that portray Congress's failure to refer to reciprocity agreements as nothing more than one detail among many that did not merit the attention of Congress, or that the express language chosen by Congress had a much broader effect than the words themselves would plainly indicate, are reminiscent of arguments that were rejected by this Court in *Artuz v Bennett,* 531 US 4 (2000) and *National Cable Telecommunications Ass'n, Inc v Gulf Power Co, et al,* 534 US 327; 122 S Ct 782 (2002).

In *Artuz,* the issue before this Court was whether an application for state post-conviction relief containing claims that are procedurally barred is "properly filed" within the

meaning of 28 USC 2244(d)(2).[6] The Petitioner in that case contended that an application for post-conviction or other collateral review was not "properly filed" for the purposes of 28 USC 2244(d)(2) unless it complied with all mandatory state-law procedural requirements that would bar review of the merits of the application. 531 US at 8. In a unanimous decision this Court disagreed, noting that in common usage, the question whether an application has been "properly filed" is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar. *Id,* 531 US at 9. Ignoring this distinction, this Court reasoned, would then require judges to engage in verbal gymnastics when an application contained some claims that are procedurally barred and some that are not. *Id,* 531 US at 10. This Court then concluded, saying:

> Presumably a court would have to say that the application is "properly filed" as to the nonbarred claims, and not "properly filed" as to the rest. The statute, however, refers only to "properly filed" applications and does not contain the peculiar suggestion that a single application can both be "properly filed" and not "properly filed." (531 US at 10.)

This case, like *Artuz,* similarly adds a condition that is not contained in the language of the statute. The Petitioner in this case asks that the word "fee" in 49 USC 14504(c)(2)(B)(iv)(III) be interpreted to necessarily include "reciprocity agreements" even though that statutory provision does not contain such language. Moreover, the Petitioner asks this Court to perform a similar feat of verbal gymnastics. The word "fee", as that term is commonly understood, is a fixed

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[6] The pertinent language of 28 USC 2244(d)(2) provides:

> "... the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

charge or sum paid for services. See, Black's Law Dictionary, 553 (5th ed. `1979) (defining "fee" as "a charge fixed by law for services of public officers or for use of a privilege under control of government"). It is the Petitioner's argument that Michigan, under the SSRS, is authorized to collect a $10 per-vehicle fee from those carriers that paid a $10 fee to Michigan in 1991, but that a zero dollars fee, under the SSRS, applies to carriers that did not pay a $10 fee to Michigan in 1991. But a zero dollars fee is, by definition, no fee at all since there is no charge or payment involved. Indeed, the Petitioner admits as much when it argues at page 17 of its brief that if the charge is zeroed out due to reciprocity agreements, there is no fee.

In *National Cable,* this Court was presented with the question whether the Communications Act applied to utility pole attachments that provide high-speed internet access at the same time as cable television. This Court noted that the Communications Act required the FCC to "'regulate the rates, terms, conditions for pole attachment,' § 224(b) and defines these to include 'any attachment by a cable television system,' § 224(a)(4)." 122 S Ct at 786. The respondents advanced the interpretation that it was wrong to concentrate on whose attachment was at issue, arguing instead that the focus should be on what the attachment does. *Id.* This Court, however, rejected this argument and applied the unambiguous language of the statute, reasoning that an enhanced service did not change the character of the attaching entity. *Id.* If the attachment was by a cable television system, that was what mattered under the statute.

The Petitioner and its *amici* make basically the same argument in this case. Even though the mention of reciprocal agreements is nowhere to be found in the statute, they nonetheless contend that Congress somehow meant that reciprocity agreements were to be used to limit the vehicle fee a state could charge once the SSRS was implemented. This conclusion, however, has no foundation in the plain language of 49 USC 14504(c)(2)(B)(iv)(III).

3. The Michigan Supreme Court's decision results in a statutory scheme that is coherent and consistent.

The Petitioner and its *amici's* reading of 49 USC 14504(c)(2)(B)(iv)(III) is inconsistent with a Congressional intent of balancing the interests of States and motor carriers. Just this term in *Barnhart v Sigmon Coal Co, supra,* this Court noted:

> As in all statutory construction cases, we begin with the language of the statute. The first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v Shell Oil Co.,* 519 US 337, 340 (1997) (citing *United States v Ron Pair Enterprises, Inc.,* 489 US 235, 240 (1989)). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" 519 US at 340. (534 US at ___; 122 S Ct at 950.)

In this case, the Michigan Supreme Court's reading of the plain and unambiguous language of 49 USC 14504(c)(2)(B)(iv)(III) results in a statutory scheme that is coherent and consistent.

The Petitioner and its *amici* argue that the Michigan Supreme Court's decision is inconsistent with the statutory scheme, arguing that it could result in an increase in fees that would be contrary to Congressional intent. However, a review of the legislative history demonstrates that it is the Petitioner and its *amici's* reading that is inconsistent with the statutory scheme prescribed by Congress.

The argument advanced by the United States is representative of this claim. It argues that the Michigan Supreme Court's decision could result in a significant increase

in fees.[7] It further argues that "[n]othing in the legislative history suggests that Congress's effort to *preserve* state revenues (H R Conf Rep No. 404, *supra* at 437) (emphasis added) should be interpreted to allow the States to *increase* their registration fees." U.S. Brief, p 17 (emphasis in original). Reference to H R Conf Rep No. 102-404, 437 is instructive. It provides, in pertinent part:

> In order to preserve revenues for states which had participated in the bingo program, Section 405 establishes a new annual fee system enabling such states to continue to collect funds from interstate motor carriers.

As the foregoing demonstrates, Section 405 sought, as among its purposes, to "preserve revenues" to the extent that the States could "continue to collect funds from interstate motor carriers." The United States, however, interprets this legislative history as barring any and all increases in fees, even where the resulting fee would not exceed the $10 cap and when the State was actually charging or collecting such a $10 fee from carriers as of November 15, 1991.

With regard to fees, the intent of Congress was not to protect motor carriers from any or all increases in fees, but rather to preserve the flow of revenues to the States. After all, the SSRS had already, through its single state filing concept provided carriers with a considerable monetary benefit due to the significantly reduced administrative costs to be borne by the motor carriers. This reduction in administrative costs to motor carriers was due to the fact that henceforth the carrier

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[7] In this regard, it is unknown and speculative to predict what, if any, action other participating States would take should this Court affirm the Michigan Supreme Court. For its part, Michigan has no intention of rescinding the reciprocity arrangements it has as it indicated in its supplemental brief filed in January, 2002. Furthermore, the Respondents suspect that such uncertainty could finally prompt the Department of Transportation into replacing the SSRS, which it was required to do no later than December, 1997. See, ICC Termination Act of 1995, PL 104-88, § 13908, 109 Stat 888-889.

would only have to register for interstate authority in a single state. Previously, carriers would have to separately register in each State in which it operated. The problem with the single state filing concept, from the States' perspective, was that it would result in the loss of millions of dollars in revenue. The remedy chosen by Congress to ensure a continued revenue stream to the States was 49 USC 14504(c)(2)(B)(iv)(III). Congress accomplished this by providing that a State could charge a fee, not to exceed $10, that the State collected or charged as of November 15, 1991. Thus, if a State was collecting or charging the fee as of November 15, 1991, it could continue to do so under the SSRS. Congress neither specified what that fee could be (provided it was less than $10), nor did it indicate that the fee either had to be collected or charged from all carriers as of November 15, 1991. Furthermore, Congress did not specify that a State could only continue to collect and charge a fee from a carrier provided it collected from or charged a fee to that particular carrier on November 15, 1991.

Moreover, there is the matter of reciprocity agreements. As previously noted, Congress makes no mention of reciprocity agreements in 49 USC 14504. Presumably, the participating States under the SSRS continue to possess the authority to enter into or terminate reciprocity agreements just as they had been able to do prior to November 15, 1991. But under Petitioner's interpretation States lose flexibility to respond to changing circumstances because their ability to charge or not charge fees would be frozen in time. That is, there would be an economic disincentive for States to enter into any new reciprocity agreements, since those States would have no way to recapture the loss of revenues. The reasons for entering into or terminating reciprocity agreements will vary from State to State and change over time. Thus, the Petitioner's interpretation of 49 USC 14504 effectively eliminates the State's authority to enter into reciprocity agreements even though Congress has not ordained such a result. In short, the Petitioner has interpreted the SSRS in a manner that frustrates increased cooperation among the States.

B. THE ICC'S INTERPRETATION OF 49 USC 14504(c)(2)(B)(iv)(III) IS NOT BASED ON A PERMISSIBLE CONSTRUCTION OF THAT STATUTE.

In the event that this Court finds that 49 USC 14504(c)(2)(B)(iv)(III) is silent or ambiguous on whether the MPSC may lawfully charge or collect a $10 vehicle fee from the Petitioner, then it looks to whether the ICC's construction of that statutory provision is a permissible one. *Chevron, supra.* In this case, however, the ICC's construction is not an interpretation, but a rewrite.

The text of 49 USC 14504(c)(2)(B)(iv)(III) basically does three things. First, it authorizes the ICC to establish a fee system, with amended standards that results in a fee system that "will result in a fee for each participating State." Second, it places a cap on the fee such that it does "not exceed $10 per vehicle. Third, it states that the fee shall be "equal to the fee. . . that such state collected or charged as of November 15, 1991. The ICC's "interpretation" is not permissible, because it results in multiple fees per state, imposes a cap less than that authorized by Congress, and prevents Michigan from charging $10 per vehicle even though Michigan actually collected and charged the $10 per vehicle fee as of November 15, 1991.

1. 49 USC 14504(c)(2)(B)(iv)(III) mandated the ICC to establish a fee system that resulted in a single fee, not multiple fees, for each participating State.

49 USC 14504(c)(2)(B)(iv)(III) requires the ICC to establish a fee system that "will result in *a fee* for each participating state." (emphasis added). The word "fee" is singular, not plural. This by itself, however, is not conclusive inasmuch as the opening of the United States Code declares: "[i]n determining the meaning of any act or resolution of Congress, words importing the singular number may extend and be applied to several persons or things; [and] words

importing the plural number may include the singular; ..." 1 USC 1. Nevertheless, this principle does not require that singular and plural words forms have interchangeable effect.

In *First National Bank v Missouri,* 263 US 640 (1923), this Court declined to apply this principle to a statute that required that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate." 263 at 657. After noting that a strict reading of this statutory provision, employing as it does the article "an" to qualify words in the singular number would then confine the association to one office or banking house, this Court stated:

> We are asked, however, to construe it otherwise in view of the rule that "words importing the singular number may extend and be applied to several persons or things." Rev. Stat. § 1, Comp. Stat. § 1, 9 Fed. Stat. Anno. 2d ed. p. 388. But, obviously, this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute. See *Garrigus v. Parke County,* 39 Ind. 66, 70; *Moynahan v. New York,* 205 N.Y. 181, 186, 98 N.E. 482. Here there is not only nothing in the context or in the subject-matter to require the construction contended for, but other provisions of the national banking laws are persuasively to the contrary. (263 US at 657.)

In this case neither the context nor subject matter requires the construction that multiple fees, based on the identity of a particular carrier, is required. To the contrary, the Congressional intent behind the enactment of the SSRS compels the opposite conclusion. That is, Congress sought to establish a single maximum per-vehicle fee per state rather than multiple maximum per-vehicle fees per State. This is because the SSRS, as an overall statutory scheme, sought to provide uniformity and simplification to the process of registering interstate vehicles in those States where they would

operate. The establishment of multiple maximum per vehicle fees per state is wholly inconsistent with such an overall statutory scheme.

Under the ICC interpretation, more than one fee is established for Michigan. There is the $10 fee for the majority of carriers and a fee of zero dollars for some other carriers. This, of course, is predicated on the assumption that there can be such a thing as a zero dollars "fee." See Argument A.2., *infra.* The statute, in the context of the overall statutory scheme to implement a simplified, uniform registration system, however, requires a single fee. The ICC's interpretation which results in the establishment of multiple fees for each participating State is in direct conflict with the fee system envisioned by Congress and is not a permissible interpretation.

2. The ICC's interpretation, (i) prevents Michigan from charging or collecting a $10 fee per vehicle even though Michigan charged and collected such a $10 fee as of November 15, 1991, and (ii) results in a cap on the per vehicle fee that is less than the $10 limit specifically set by Congress.

It is not disputed that Michigan collected or charged a $10 per vehicle fee as of November 15, 1991. Therefore, under the plain and unambiguous language of 49 USC 14504, Michigan should be permitted to continue to charge or collect up to $10 per vehicle under the SSRS. The ICC's interpretation, however, adds another condition not contained in the statute, i.e., that the $10 per vehicle fee must have been charged to or collected from a particular carrier as of November 15, 1991. But there is simply no requirement in 49 USC 14504 to that effect. Not only is Michigan's interpretation in line with the express language of the statute, it is consistent with its legislative history.

As previously noted, in H R Rep No. 102-171(I), p 115, which discussed an earlier version of the SSRS, a state could participate in the SSRS "if it had imposed and collected fees in 1991," reprinted in 1991 USCCAN at 1641. Clearly the focus

was on what actions the State undertook in 1991. Under the Conference substitute, the focus remained unchanged, as it is the action of the State in 1991 that determines whether the State can charge or collect the $10 fee. This is demonstrated by the fact that the language of 49 USC 14504(c)(2)(B)(iv)(III) refers only to the State and the fee collected or charged by the State. There is no mention of either reciprocity agreements or carriers.

As to the fee that could be charged or collected under the SSRS, Congress capped it at $10 per vehicle. Despite this, the ICC's interpretation effectively caps the fee at zero dollars for thousands of vehicles in States that charged and collected fees as of November 15, 1991. The concept that Congress intended to prohibit the States from collecting or charging a fee of up to $10 per vehicle, when their respective State statutes authorized them to do so and when those States charged or collected just such a per vehicle fee, as of November 15, 1991, has no foundation in the language of the statute.

The language of 49 USC 14504(c)(2)(B)(iv)(III) imposes a single fee cap of $10. It does not vest the ICC with the discretionary authority to either increase or decrease that limit for a particular carrier. Yet that is precisely what the ICC's interpretation does. The basis for this, according to the brief of the United States is constructed not from the language of the statute but rather from what Congress meant, but didn't say.

Under the ICC's interpretation, its setting of a per vehicle fee limit of less than $10 is constructed upon three intended, but not specified purposes, of Congress. First, that the fee a State may charge or collect under the SSRS is limited to what it charged to or collected from *a particular carrier*. Yet, the word "carrier" is absent from 49 USC 14504(c)(2)(B)(iv)(III). Second, that *reciprocity agreements* determine what fee the State charged or collected as of November 15, 1991. Yet, 49 USC 14504(c)(2)(B)(iv)(III) makes no mention of "reciprocity agreement." Third, that if a State did not charge or collect the $10 fee from a particular

carrier due to a reciprocity agreement, the State's per vehicle fee is forever capped at zero for that particular carrier since otherwise any charge by the State to that particular carrier would constitute an *increase* in fees. This, the ICC argues, is contrary to Congress's intent to preserve revenues for the State.

Recently in *Great West Life & Annuity v Knudson*, 534 US 204; 122 S Ct 708, 718 (2001), this Court noted:

> [V]ague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of the text regarding the *specific* issue under consideration. (quoting from *Mertens v Hewitt Associates*, 508 US 248, 261 (1993) (emphasis in original).

The foregoing principle, laid down in *Mertens*, has equal applicability here.

The ICC's setting of a fee cap of zero dollars per vehicle cannot be justified upon the vague notion that a basic purpose of Congress in establishing the SSRS was to preserve revenues for the States. The specific method chosen by Congress to preserve revenues was to allow a State to continue charging fees under the SSRS if it collected or charged a fee as of November 15, 1991. Moreover, Congress determined that the maximum fee a State could charge under the SSRS was $10 per vehicle, provided the State charged or collected such a fee from carriers as of November 15, 1991. Since Michigan in fact collected and charged the maximum $10 fee from carriers throughout 1991, it may continue to do so under the SSRS. The ICC's interpretation, however, prevents Michigan from charging or collecting a $10 fee per vehicle even though Michigan charged and collected such a $10 fee from carriers as of November 15, 1991. Furthermore, the ICC's interpretation results in a per vehicle fee cap that is less than the limit specifically set by Congress. Thus, the ICC's interpretation is not a permissible one since it is contrary to the language of 49 USC 14504(c)(2)(B)(iv)(III) and inconsistent with its legislative history.

CONCLUSION

The judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted

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Dated: May, 2002